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IN THE

Supreme Court of the United States

No. 75-1172

October Term, 1975

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Petitioner,

v.

USAFORM HAIL POOL, INC., *Et Al.*,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, which was entered on November 20, 1975.

INTRODUCTION

In filing this Reply to Respondents' Brief in Opposition to its Petition for Writ of Certiorari Petitioner expressly recognizes that its reply is confined to "new" matters raised in Respondents' brief that were not originally addressed in the petition. Accordingly, Petitioner will not re-argue or re-urge its original arguments and authorities already developed in its original petition. However, Respondents' misanalysis of Petitioner's contentions requires correction. Since the record in the Court of Appeals is not presently before the Court, Petitioner urges the following additional considerations in clarification of its original Petition and in reply to Respondents' brief.

I.

This Petition for Certiorari Involves the Fundamental Question of the District Court's Jurisdiction over its own "Final" Judgments under Fed. R. Civ. P. 60(b) To Restore a Lost Right of Appeal in a Case that had Already Been Fully Tried on its Merits.

Petitioner notes Respondents' misstatement of Rule Fed. R. Civ. P. 77(d) that appears on page 3 of Respondents' Brief. Respondents assert that Rule 77(d) "states that the failure of the clerk to notify parties of the entry of an appealable order or judgment, *standing alone*, does not affect the time for filing the notice of appeal". [Emphasis in original].

The "standing alone" language does not appear in Rule 77(d) of the Federal Rules of Civil Procedure. Respondents' attempted enlargement of the rule by adding these two words is impermissible as demonstrated in the Petition for Certiorari.

Moreover, Respondents' entire argument in reply to Petitioner's first reason for granting certiorari wrongfully assumes a premise nonexistent in the very question which Petitioner asked this Court to determine. Specifically, Respondents' opposition brief, p. 3, states, both as premise and conclusion, that the District Court properly exercised its authority under Rule 60(b)(6) of the Federal Rules of Civil Procedure in setting aside its previous judgment and reentering it in order to permit an appeal after expiration of the time allowed by law. The propriety of such action is the precise question which Petitioner has presented for review. The first question presented is whether the trial court has jurisdiction under the aegis of Rule 60(b)(6) to vacate and reenter its previously "final" judgments in disregard of the limitations expressly provided by Congress.

Respondent erroneously argues at p. 3 in Brief:

> "When the Court sets aside a judgment, that judgment becomes a nullity to which the provisions of the rules and statutes cited by Petitioner can have no application. If the District Court properly uses its authority under Rule 60(b)(6) to set aside a judgment and subsequently enters a new judgment, the provisions cited by Petitioner then have application only to the new judgment, the previous judgment then being void."

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If accepted, this argument is tantamount to permitting the trial court to continuously exercise jurisdiction under Rule 60(b)(6) to set aside its previous judgments. Under this argument the court not only may reenter them in order to permit an untimely appeal, but it also may change its judgment and readjust the rights of the litigants under the prior judgment. Petitioner's petition vigorously opposes this unjustifiable extension of the District Court's general jurisdiction to vacate, alter or modify its judgments in cases which have already been tried on their merits.

The record of the Court of Appeals unmistakably reveals that Respondents' application for relief from judgment under Rule 60(b)(6) was based solely on the grounds:

> "That the Court based its judgment of August 2, 1973, on altered findings of fact which were contrary to the law of the case."

Thus, Respondents urged the District Court to enter a new judgment on the merits under Rule 60(b)(6), not to reenter the old judgment. Respondents' asserted position vitally endangers the finality of any judgment on the merits. When shall litigation end? The Congress has provided an answer, and it is that answer which stands challenged by the current opinion of the Fifth Circuit Court of Appeals.

Respondents finally urge that their argued construction of Rule 60(b) arises under such a unique set of circumstances as not to warrant review. To the contrary, the question of timely filing of notice of appeal arises in every appeal. It is significant to note the trial court's own justification of "unique circumstances" for the relief from its judgment. In the order granting the Rule 60(b)(6) relief, the Court noted the following seven reasons that are virtually identical to those urged by the Fifth Circuit Court of Appeals. Those seven articulatd reasons are:

> "(1) The legal issues and factual background are complex, (2) Nearly $1,000,000.00 is involved, (3) The cause has been in litigation for nearly ten years, (4) The cause was under advisement for six months before the judgment was entered, (5) The failure of the clerk or Court to notify litigants of the judgment, (6) The failure of all litigants to learn of the judgment during the allowable appeal time, and (7) The anticipation of an appeal by all

litigants . . ." (District Court order, page 2, filed January 14, 1974)

Thus, the unique circumstances consist of the clerk's failure to notify the party litigants of a judgment in an old and complex lawsuit involving a large ad dammum. These circumstances do not render this particular case so unique as to justify ignoring the clear Congressional mandates in 4(a) and 28 U.S.C.A. § 2107. To the contrary, the Advisory Committee's recommendations that were adopted in Rule 77(d)were specifically directed at this problem. Petitioner concedes that the Court of Appeals expanded on the District Court's holding by asserting that none of the parties had been prejudiced. It is impossible for a defendant who has won a large lawsuit to ever demonstrate prejudice from the failure of the opposing party to take an appeal, except by claiming his statutory right to a final judgment. What if the defendant had received notice of the entry of the judgment and the plaintiff had not? Would that change in circumstance significantly differ from the present facts so as to avoid application of the rule articulated by the lower court? What if the clerk swore that he had mailed it, and the attorney swore that he had not received it? Would that justify relief under Rule 60(b)(6)? Respondent argues that that determination is an act of discretion by the District Court. That argument totally and completely sacrifices the language and clear intent of the Federal Rules. Respondent claims that the relief is justified by circumstances in *addition* to the clerk's failure to notify. However, that is the only circumstance extant in *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institute*, 500 F.2d 808 (D.C. Cir. 1974) which Respondents cite and rely upon.

It is of vital concern to all federal litigants to determine whether Congress really intended for there to be an end to litigation. Just as parties may not agree to jurisdiction in the District Court when there is none, there must be no affirmative burden to show prejudice on the part of an appellee when an appellant desires to take an untimely appeal. If the court has jurisdiction under Rule 60(b) to vacate and reenter the same judgment, it has the authority to change it. Clearly, that was not the intent of the Congress in enacting Rule 60(b)(6). And clearly, the fact that that rule was adopted at the same session of the Congress as the amendments to Rule 77(d) and the promulgation of F.R.A.P. 4(a) is dispositive of Respondents' argument.

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II.

The Court of Appeals Manifestly Exceeded its Constitutional and Statutory Authority in a Diversity Case by Creating and Applying a New Presumtion that Shifted the Burden of "Disproving" an Insurable Loss to the Insurer in Disregard of Applicable State Law.

Petitioner does not herein propose to restate or reargue all of its reasons for granting certiorari advanced in its original petition. However, it is significant that Respondents on page 19 of their Brief assert that the Court of Appeals did not shift the burden of proof to Petitioner and then concede on page 20 that:

> "The burden of proving legitimacy under these undisputed factual circumstances shifts to Petitioner."

It is clear that there was a shifting of the burden of proof on the issue of insurable loss that was achieved by the Court of Appeals in its opinion. It is equally clear that there is no Florida law justifying such a shifting of the burden of proof. The only authority ever cited for such a proposition involved a contest between a member of a board of directors and a shareholder to whom the defendant owed a fiduciary duty. That was the articulated basis for the presumption. Thus, the effect of the holding of the Court of Appeals and the arguments urged by Respondents is to render the fidelity insurer of closely-held interlocking corporations to be a fiduciary in relation to its insureds. There is no law, Florida, federal, or otherwise, that supports such a principle. It is totally foreign to all established principles of insurance law. Nor is it applicable only to the "unique" set of circumstances in this case.

Neither Petitioner nor Respondent quarrels with the holding in the first Court of Appeals opinion that the creditors of the insured are not covered by the fidelity bond under established principles of Florida law. But that principle has been effectively repudiated by the adoption of a presumption that shifts the burden to the insurer to "disprove" that an insured loss has been suffered. Not only is the far-reaching import of this decision suggestive of review by this Court because of

its application to other fields of insurance law, but also because the Court of Appeals exceeded its Constitutional and statutory authority in declaring new substantive principles of state law totally foreign to that state's jurisprudence. When faced with a question that has yet to be resolved by the state court, a federal court's obligation is to resolve it in a manner consistent with accepted state policy. Such federal tribunal is not free to totally disregard existing state law and promulgate new principles that shift to the opposite party the burden of "disproving" that such law would be accepted if argued in that state. The Federal Court of Appeals has no statutory or constitutional authority to materially alter the substantive law of the State of Florida. Yet that is the effect of the Court's decision. And that is the power argued as a justification for this opinion. This excess of power and its drastic consequences are the principal reasons why Petitioner has urged that certiorari be granted and the merits reviewed.

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CONCLUSION

For the foregoing and all other reasons asserted in its original petition for certiorari, Petitioner prays that this Court grant petition for certiorari and upon full hearing, hereof, reverse the opinion and judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true and correct copies of the foregoing were mailed by United States mail, postage prepaid, addressed to the following individual at the following address:

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By